

Protest of) Date: September 3, 1992
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 AMERIFLIGHT, INC.)
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 Solicitation No. D5R-02-92) P.S. Protest No. 92-42

DECISION

Ameriflight protests the rejection of its low bid as nonresponsive under solicitation no. D5R-02-92 for air taxi transportation service between Seattle and Spokane, WA, issued on February 26, 1992, by the Seattle Transportation Management Service Center (TMSC). The contracting officer rejected Ameriflight's bid because he determined that Ameriflight had qualified its bid.

The solicitation specifically incorporated the terms and conditions of several Postal Service forms, including Form 7455. Form 7455 included, among other things, the following requirements:

Aircraft Requirements

. . .

2. The aircraft must meet the performance and equipment standards equal to those required under FAR Part 135, Subpart C, as they apply to IFR passenger-carrying operations. Navigational equipment must be adequate to enable use of non-radar approach procedure providing the lowest published landing minimums (except Category II operations).

. . .

5. In addition, unless a second-in-command is to be assigned at all times, the aircraft shall be equipped with a functioning automatic pilot system that will meet the requirements contained in FAR Part 135, Paragraph 135.105.

. . .

Flight Personnel Qualifications

. . .

6. Must have completed a route and airport check in accordance with FAR 135, Paragraph 135.299. Exception: The check must be conducted over the entire route to be flown with stops at each airport to be served.

Ameriflight attached a letter, dated April 6, to its bid requesting relief from all three of these provisions. Ameriflight explained that as an all cargo airline, it "operate[s] these aircraft single-pilot, in accordance with FAR 135.101", and it is "not required to have a second-in-command or an approved autopilot in lieu of a second-in-command". Moreover, Ameriflight explained its need for relief from the requirement that its pilots complete a route and airport check as follows:

Our system wide roster currently includes more than 140 pilots. Because of transfers into and out of our various flight crew domiciles, vacations, illness, etc., it would be extremely costly and difficult to insure that each pilot that might be assigned to these USPS contract flights was route and airport checked by a company check airman beforehand.

On April 7, bids were opened and the contracting officer discovered that Ameriflight was low (\$1.77 per mile), but its bid included the above-described letter. The contracting officer therefore did not select an offeror for award and on May 8, requested offerors to extend their bids. On May 13, Ameriflight agreed to extend its bid. Subsequently, on June 8, Ameriflight sent a letter attempting to modify its bid by removing its request for any deviations from the solicitation requirements. On June 10, the contracting officer informed Ameriflight of his determination that its bid was nonresponsive.

Ameriflight argues that its April 6 request for deviations was not intended to qualify its offer to perform in accordance with specifications. It states that it reinforced the precatory nature of its April 6 letter by conversation with a member of the contracting officer's staff and that the staff member advised that the letter would be interpreted as a mere request for changes. Ameriflight further argued that its subsequent June 8 letter withdrew the request for deviations and that its letter should be accepted as a late modification in accordance with PM 4.1.3.d.2. Finally, it argues that the contracting officer should have treated Ameriflight's request for deviations as a mistake in bid and requested clarification.

In his statement the contracting officer argues that despite Ameriflight's use of the word "request" in its April 6 letter, Ameriflight had qualified its bid upon the Postal Service's acceptance of the deviations. The contracting officer also states that his staff member had not assured Ameriflight's representative that its letter would be treated as a request, but rather warned the Ameriflight representative that any qualification of their bid would be determined to be nonresponsive. Finally, the contracting officer states that Ameriflight misinterpreted his request to extend bids as an opportunity to modify its proposal.

Ameriflight filed comments to the contracting officer's statement pointing out that their April 6 letter did not condition its bid, but merely "requested" certain changes in the solicitation specifications. The comments emphasize that Ameriflight's letter used the word "request" in connection with the deviations and that the Comptroller General has found requests for advance payments to be merely precatory in nature.

The contracting officer replied to Ameriflight's comments by arguing that Ameriflight incorrectly contended that the variances it requested were trivial in nature. Ameriflight subsequently replied by stating that the contracting officer incorrectly attributed to it a position it had never taken.

Discussion

Our procurement regulations require that "[t]o be considered for award, bids must comply in all material respects with the solicitation requirements." PM 12.7.4 a. See Scandura, Inc., P.S. Protest No. 80-49, January 6, 1981, (where a bid sample failed to meet the requirements of the specifications, award to that firm was improper). In this case, the protester concedes that it requested deviations from the solicitation requirements, but contends that its request was not intended to qualify its offer to perform in accordance with solicitation requirements.

The Comptroller General has found that "[a] request for a deviation from a material term in an IFB renders a bid nonresponsive if the bid as a whole shows that the request is more than an expression of a wish or desire". A&Z Engineering Company, B-222806, April 21, 1986, 86-1 CPD & 388; See also Lavelle Aircraft Company, B-218309, June 12, 1985, 85-1 CPD & 678. In the A&Z Engineering case, the protester's letter requesting the deviation indicated that the requested deviations in the type of alloy to be used were necessary for manufacture with the protester's tooling. As a result, the Comptroller General found that the protester could not perform without the required deviations and therefore protester's performance was conditional upon acceptance of the deviations. A&Z Engineering, *supra*.

The present situation closely resembles that in A&Z Engineering. In our case the protester states that the aircraft used to perform service do not possess autopilot

avionics. In addition, the protester states "[b]ecause of transfers into and out of our various flight crew domiciles, vacations, illnesses, etc., it would be extremely costly and difficult to insure that each pilot that might be assigned to these USPS contract flights was route and airport checked by a company check airman beforehand" (emphasis added). In our view these statements indicate such extreme difficulties for the protester to perform without the requested deviations that its bid must be viewed as conditioned upon the acceptance of the deviations.^{1/}

Although the protester in its June 8 letter offered to perform without these deviations, that letter cannot be considered in determining whether the protester's bid was qualified because the responsiveness of a bid must be determined from the material available at bid opening. See A&Z Engineering Company, supra.

At the time of bid opening, the protester's April 6 letter and bid indicate the extreme difficulties in performing without the deviations which we noted above, clearly making unconditional performance ambiguous in violation of PM 12.7.4 a.

In addition, the protester's June 8 letter cannot be a late modification because in the case of sealed bids, late bids may only be accepted if they meet the following requirements:

- (a) They were sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt;
- (b) They were sent by Express Mail service (post office to addressee) not later than the second calendar day (excluding Saturdays, Sundays, and Federal holidays) before the date specified for receipt; or
- (c) They were sent by mail (or telegram if authorized), or delivered by other means to the precise depository prescribed in the solicitation, and it is determined by the contracting officer that the late receipt was due solely to mishandling after receipt by the office designated to receive bids.

PM 12.7.4 c. Ameriflight's June 8 letter was dated over two months after bid opening and therefore does not comply with the limited instances cited in PM 12.7.4 c. See Specialized Welders, P.S. Protest No. 79-43, September 12, 1979.

^{1/} The cases cited by Ameriflight are very different from the present situation. All of these cases, except one, concerned requests for advance payments without any indication that the offeror could not perform without the advance payment. The lone exception concerned a situation in which the letter requesting the deviation was dated five months before bid opening and for that reason was held not to be an attempt to condition the protester's bid. See Harnischfeger Corporation, B-224371, September 12, 1986, 86-2 CPD & 296.

Moreover, the contracting officer properly did not treat Ameriflight's April 6 letter requesting deviations from requirements as a mistake. Our regulations require the contracting officer to request a bid verification when a mistake is apparent on the bid documents, such as when a clerical or typographical mistake is made. See PM 12.7.6 b. 1. In this case, Ameriflight's April 6 letter clearly seeks a deviation from requirements and the only issue is the legal significance of the letter.

Finally, because Ameriflight has presented no evidence to overcome the presumption of correctness which attaches to the contracting officer's statement, we accept the contracting officer's statement that his staff member had not assured Ameriflight's representative that its April 6 letter would be treated as a request for a deviation. See Cohlma Airlines, Inc., P.S. Protest No. 87-118, April 13, 1988.

The protest is denied.

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